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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 999

JOSEPH DELMAN and JEANETTE DELMAN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOSEPH DELMAN and JEANETTE DELMAN,

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v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The findings of fact and opinion of the Tax Court were filed March 22, 1966 as T. C. Memo 1966-59 (Appendix C, *infra,* pp. 12a-25a). The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-10a) was filed October 10, 1967, but is not yet reported.

Jurisdiction

The judgment of the Court of Appeals (Appendix B, *infra,* p. 11a) was entered October 10, 1967. The last date for filing a petition for a writ of certiorari is January 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Under Section 6212 of the Internal Revenue Code, *must* the Commissioner mail a deficiency notice by registered or certified mail to the taxpayer at his *last known address;* or is such notice, *albeit not sent to the taxpayer's last known address,* nonetheless valid, as found by the court below, if actually received by the taxpayer, by ordinary mail, in time to file a petition with the Tax Court?

2. What is meant by the term, "last known address", as used in Section 6212?

3. Where a notice determining a tax deficiency and addressed to other than the taxpayer's last known address is not physically received by the taxpayer until after the applicable period of limitations has run, is assessment of such deficiency barred?

Statute Involved

The relevant provision of the Internal Revenue Code of 1954, 26 U. S.C. § 6212, is as follows:

> "SEC. 6212. NOTICE OF DEFICIENCY.
>
> "(a) IN GENERAL.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

"(b) ADDRESS FOR NOTICE OF DEFICIENCY.—

"(1) INCOME AND GIFT TAXES.—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a defiiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

"(2) JOINT INCOME TAX RETURN.—In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address."

Statement of the Case

The facts as found by the Tax Court and adopted by the Court of Appeals may be summarized as follows:

The taxpayers, Joseph and Jeanette Delman, are husband and wife. They filed their joint income tax returns for the calendar years 1960 and 1961, the taxable years involved herein, with the District Director of Internal Revenue, Newark, New Jersey (Appendix C, *infra*, p. 13a).

During April 1961, when the taxpayers filed their 1960 return, they resided at 67 Clinton Avenue, Millburn, New

Jersey, which was shown on their 1960 return as their home address (Appendic C, *infra,* p. 13a).

The address shown on the face of the taxpayers' 1961 return and on six other pages thereof was

> c/o Goodman, Israelow & Lipton
> 249 Clinton Avenue
> Newark, New Jersey (Appendix C, *infra,* pp. 13a-14a)

[However, on Schedue SE (U. S. Report of Self-Employment Income) filed with the 1961 return, but applying to Joseph only, his home address was shown as "1604 Juniper Avenue, Elkins Park, 17] Pa." (R. 21a).*

Since early in 1962, the taxpayers have resided continuously at 1604 Juniper Avenue, Elkins Park, Pennsylvania (Appendix C, *infra,* p. 13a).

In their 1962 and 1963 income tax returns, the taxpayers showed the Elkins Park address as their home address (Appendix C, *infra,* p. 15a).

The record does not disclose where the taxpayers filed their 1962 and 1963 returns. However, prior to December 24, 1964, when the Newark District Director issued the deficiency notice in this case, the latter official was well aware that the taxpayers had shown the Elkins Park address on their 1962 return as being their home address. For, on November 12, 1964, he issued an official report (Form 917) to the District Director in Philadelphia, Pennsylvania, expressly stating that the taxpayers' address, as shown on their 1962 income tax return, was 1604 Juniper

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* Reference is to page 21a of the appendix filed by petitioner below and certified as part of the record below pursuant to stipulation of the parties filed with the Clerk of the Court of Appeals.

Avenue, Elkins Park, Pennsylvania (Appendix C, *infra,* pp. 15a, 18a).

Four other events occurred which establish that when the deficiency notice was issued (on December 23, 1964) and for some time prior thereto, the Elkins Park address, and no other, was the last address of the taxpayers known to the District Director in Newark.

First, in April 1963, he mailed to the petitioner, Joseph Delman, Treasury Form L-20, requesting certain information respecting the taxable year 1961 (Appendix C, *infra,* p. 14a). In the Form L-20, which Joseph completed and mailed back to the Newark District Director, he advised that since filing their 1961 return, he and Mrs. Delman had changed their address to 1604 Juniper Avenue, Elkins Park, Pennsylvania (Appendix C, *infra,* p. 15a).

Second, in the latter part of 1963, one Russo, a revenue agent in the Newark District Director's office who had been assigned to examine the taxpayers' 1961 return, was orally advised that the taxpayers resided at the Elkins Park address (Appendix C, *infra,* p. 15a).

Third, in February 1964, and *fourth,* again in October 1964, Russo prepared Treasury Forms 872, with respect to the taxable year 1960 on which Russo had typed the notation that the taxpayers' "Street address" was "Presently: 1604 Juniper Avenue, Elkins Park, Pennsylvania" (Appendix C, *infra,* pp. 15a, 17a).

During his examination of the taxpayers' 1961 return, Russo had dealt for a time with one Goodman, an accountant, as the taxpayers' representative (Appendix C, *infra,* p. 14a). On several occasions, prior to June 1964, Russo had been successful in communicating with Goodman in his role as the taxpayers' representative (Appendix C, *infra,* p. 22a).

a Newark attorney, Martin D.

In June 1964, the taxpayers executed a power of attorney in favor of Cohen and Goodman which was filed with the Newark District Director's Office. The power requested that a copy of all communications addressed to the taxpayers be sent to Cohen (Appendix C, *infra*, pp. 16a-17a. From and after June 1964, Russo dealt only with Cohen as the taxpayers' representative (Appendix C, *infra*, pp. 23a-24a).

On December 23, 1964, the District Director in Newark issued a notice determining income tax deficiencies against the taxpayers for the years 1960 and 1961. The notice was sent by certified mail addressed as follows:

> Mr. Joseph Delman and
> Mrs. Jeanette Delman
> Husband and Wife
> c/o Goodman, Israelow and Lipton
> 249 Clinton Avenue
> Newark, New Jersey (Appendix C, *infra*, p. 18a).

On the same day, a copy of the notice was sent to Cohen by ordinary mail. Cohen received the copy, and Goodman the original, on December 24, 1964. Goodman forwarded the original to Cohen who received it on December 28, 1964, on which day Cohen notified Joseph Delman by telephone that the deficiency notice had been issued. A copy thereof was forwarded by Cohen to the taxpayers during the week of December 28, 1964, and received by them on January 4, 1965, by ordinary mail (Appendix C, *infra*, p. 19a).

The applicable period of limitations with respect to the taxable year 1960 expired on December 31, 1964 (Appendix A, *infra*, p. 2a).

The taxpayers filed a petition in the Tax Court on April 5, 1965, 103 days after the notice of deficiency was mailed,

but within 90 days after the actual receipt of a copy thereof by the taxpayers (Appendix A, *infra*, p. 2a).

Before the Tax Court both the Commissioner and the taxpayers moved to dismiss for lack of jurisdiction. The Commissioner grounded his motion on untimely filing; the taxpayers based theirs on the grounds that the deficiency notice, not having been sent to them by either certified or registered mail at their last known address, as required by Internal Revenue Code Section 6212, was therefore invalid (Appendix C, *infra*, p. 13a).

The Tax Court held that the Commissioner "acted reasonably when he mailed the deficiency notice by certified mail to the petitioners in care of their accountant, and a copy to their attorney by regular mail" (Appendix C, *infra*, p. 21a). The Tax Court issued an order granting the Commissioner's motion to dismiss and denying that of the taxpayers (Appendix D, *infra*, p. 26a).

The Court of Appeals affirmed (Appendix B, *infra*, p. 11a).

Reasons for Granting the Writ

Section 6212* contains the provisions which create and control the Commissioner's authority to determine income, estate and gift tax deficiencies. These provisions, insofar as they relate to the determination of income tax deficiencies, may readily be summarized. Subsection (a) authorizes the Commissioner, if he determines a deficiency, to send notice thereof to the taxpayer by either registered or certified mail.

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* This and all other statutory references herein are to the Internal Revenue Code of 1954 (26 U.S.C.) except as otherwise indicated. The relevant provisions of § 6212 are set out at pp. 2-3, *supra*.

Subsection (b)(1) states, as a general rule, that in the absence of notice to the Commissioner of a fiduciary relationship, a notice of deficiency, "if mailed to the taxpayer at his last known address, shall be sufficient".

Subsection (b)(2) is concerned with the issuance of deficiency notices to married persons who file jointly and provides that unless either spouse has notified the Commissioner that separate residences have been established, the notice of deficiency may be a single joint notice. However, if the Commissioner has been so notified, Section 6212(b)(2) provides that "in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail to each spouse at his last known address".

I.

There can be no doubt concerning the magnitude of the power conferred upon the Commissioner by Section 6212; nor of the consequences of its exercise (at the rate of tens of thousands of deficiency notices annually) in the overall scheme of Federal tax administration. For example, unless a petition is filed with the Tax Court within the (non-enlargeable) period of 90 days from the mailing of a *valid* deficiency notice, the Commissioner may assess and collect the deficiency even though the notice never actually reached the taxpayer. *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (C. A. 2d Cir. 1959); *Cohen* v. *Commissioner*, 297 F. 2d 760, 772-3 (C. A. 9th Cir. 1962).

Accordingly, it is of prime importance that there be clear-cut, uniform criteria for determining if a valid notice has been issued pursuant to Section 6212. Nevertheless, as the opinion below points out, there is an admitted conflict between the courts as to whether or not it is mandatory for the Commissioner to mail a deficiency notice

to the taxpayer's last known address for purposes of Section 6212. What is perhaps even worse (as more fully explained under Point II, *infra*), confusion virtually to the point of chaos exists as to what is meant by the term, "last known address."

The court below, in affirming the Tax Court, found it to be sufficient, for purposes of Section 6212, if the Commissioner has mailed the notice to "an address where [he] reasonably believed the taxpayer wished notice to be sent," albeit not the taxpayer's last known address. Such holding is in direct conflict with the decisions of numerous other courts which have held that a deficiency notice, in order to be valid, *must* be sent to the taxpayer's last known address. *Dilks* v. *Blair,* 235 F. 2d 831 (C. C. A. 7th Cir. 1927); *Maxfield* v. *Commissioner,* 153 F. 2d 325 (C. C. A. 9th Cir. 1946); *D'Andrea* v. *Commissioner,* 263 F. 2d 904 (C. A. D. C. Cir. 1959); *Luhring* v. *Glotzbach,* 304 F. 2d 556 (C. A. 4th Cir. 1962); *United States* v. *Lehigh,* 201 F. Supp. 224 (D. C. W. D. Ark. 1961), appeal dismissed per curiam 305 F. 2d 377 (C. A. 8th Cir. 1962); *Gregory* v. *United States,* 57 F. Supp. 962, 974 (Ct. Cl. 1944).

The appended opinion of the Third Circuit expressly recognizes the conflict between its decision herein and those rendered by other courts of respectable authority in the above-cited cases, particularly the holding of the District of Columbia Circuit in *D'Andrea* v. *Commissioner, supra* (Appendix A, *infra,* p. 8a).

The conflict relates to an important question of tax administration which should now be resolved by this Court.

II.

The mailing requirements imposed by Section 6212 are rendered nugatory unless the term, "last known address",

is properly and uniformly defined. The variant and necessarily conflicting interpretations of the term by various courts have been collected conveniently in the opinion below (Appendix A, *infra*, p. 5a):

> "Numerous cases have considered the question of whether a notice of deficiency was sent to taxpayer's 'last known address.' Few cases, however, have attempted to define what Congress meant by the term. *Clark's Estate* v. *Commissioner of Internal Revenue*, 173 F. 2d 13 (2nd Cir. 1949) suggests that a notice complies with the statute if it is sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached. *Gregory* v. *United States*, 57 F. Supp. 962, 973 (Ct. Cl. 1944), cert. denied, 326 U. S. 747 states that the term 'had reference to the last known permanent address or legal residence of the taxpayer, or the last known temporary address of a definite duration or period to which all communications during such period should be sent.' *Kisting* v. *C. I. R.*, 298 F. 2d 264 (8th Cir. 1962) suggests that the last known address may be that of taxpayers' attorney where taxpayer directed that communications be sent. *D'Andrea* v. *C. I. R.*, 263 F. 2d 904 (D. C. Cir. 1959) makes that point explicitly. *Eppler* v. *Commissioner of Internal Revenue*, 188 F. 2d 95 (7th Cir. 1951) suggests that under certain circumstances the last known address may be the taxpayer's business address."

The view of the Third Circuit, as expressed in the opinion below (Appendix A, *infra*, p. 5a), is that "a notice complies with the statute if it is sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached" (Appendix A, *infra*, p. 5a). Such a rule

virtually eliminates the possibility of uniform application. Subjective judgments based on what one may "reasonably believe" are bound to vary from one District Director's office to another. A far more salutory rule would be the one adopted by the Court of Claims in *Gregory* v. *United States, supra,* that the term has reference "to the last known permanent address or legal address of the taxpayer, or the last known temporary address of a definite duration or period to which all communications during such period should be sent."

In any event, the conflict and confusion as to the correct meaning of the term "last known address," should now be resolved by this Court in the interest of more orderly and uniform administration of the tax laws.

III.

Inasmuch as the taxpayers are husband and wife who filed jointly for 1960 and 1961, it is apparent that subparagraph (2) of Section 6212(b)* governs the manner in which the deficiency notice herein was to be mailed to to them.

Nevertheless, the court's opinion makes no reference whatever to subparagraph (2) of Section 6212(b), but contains instead an extensive discussion of subparagraph (1), including an examination of its legislative history and the observation that, "[p]erhaps the most serious difficulty with this case is the attempt [sic] to apply a section of the Code which is not applicable" (Appendix A, *infra,* p. 6a).

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* See, Statute Involved, at p. 3, *supra.*

But no such "attempt" was ever made by the taxpayers! Indeed, the taxpayer's brief below has been sent up to this Court as part of the certified record pursuant to stipulation of the parties. Examination thereof will disclose *extensive* references to subparagraph (2) of Section 6212 (b); whereas, nowhere therein is the argument made, either expressly or by implication, that subparagraph (1) of Section 6212 (b) is applicable to or dispositive of this case.

It is essential to a proper consideration of the important questions posed by this case to consider the meaning of subsection (2), including *its* legislative history.

By its enactment of Section 272(a) of the Revenue Act of 1938, Congress added a provision [now §6212(b)(2), set forth on page 3, *supra*] to deal with the manner of issuing deficiency notices to spouses who have filed jointly. The new provision and its purpose are fully explained in H. Rept. No. 1860, 75th Cong. 3d Sess., CUM. BULL. 1939-1 (Part 2), 728, 763, which concludes:

> "The last sentence of section 272(a) of the bill accordinginly provides that a single joint notice may be sent in the general case but that, if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals *must be sent* by registered mail to each of the spouses *at his last known address.*" (Emphasis added.)

It is highly unlikely that Congress, in enacting Section 6212(b)(2), intended that only where spouses have established separate residences *must* each receive a copy of the deficiency notice by registered or certified mail at his (or her) last known address, whereas if they reside together,

the notice of deficiency need not necessarily be sent to their (joint) last known address. The word "may" as used in Section 6212(b)(2) relates to the Commissioner's option to send either a joint notice or separate notices where he has not been advised that the spouses reside separately, and not to the overriding requirement that the notice be sent in all events to the taxpayer's "last known address."

It follows that the court, by gratuitously and wrongly assuming the taxpayers' position to be based on Section 6212(b)(1), erroneously construed a Federal statute of considerable importance in the administration of the tax laws. It is highly desirable that the error be rectified by this Court.

IV.

A further question of importance is raised by the court's rejection of the taxpayers' alternative arguments, first, that the 90-day period for filing a petition under Section 6213(a) did not begin to run until a copy of the notice actually reached Joseph on January 4, 1965; second, that the petition filed on April 5, 1965, was within the 90-day period providded for under Section 6213(a), so that the Tax Court acquired jurisdiction as to the year 1961; and, third, that assessment and collection of income tax for 1960 is barred in any event because, due to the Commissioner's failure to send the notice to petitioners' last known address, *no actual notice* of deficiency or copy thereof was received by petitioner until after the expiration of the applicable period of limitations for 1960.

Boren v. *Riddell*, 241 F. 2d 670, 673 (C. A. 9th Cir. 1957), holds that the 90-day period for filing a petition does not begin to run, in the case of an incorrectly addressed deficiency notice, until *the date of actual receipt* of the notice by the taxpayer. Such holding varies some-

what with the view of the Seventh Circuit, as expressed in *Eppler* v. *Commissioner,* 188 F. 2d 95, 98 (1951), that the 90-day period should not begin to run, in the case of a misaddressed deficiency notice, until the *date on which notice is correctly addressed and remailed by registered mail* to the taxpayer's correct address.

In *Dilks* v. *Blair, supra,* 833, the Court of Appeals for the Seventh Circuit held in the case of an originally misadressed and subsequently remailed deficiency notice, that the "remedial purpose" of Section 274 of the Revenue Act of 1924 would be furthered, by considering in such a case the notice to have been mailed at a time and place when and where, on its return journey toward the taxpayer's address, it reached a point substantially the same distance from him as is Washington [the place from which the notice was originally mailed]".

Each of these views conflicts with the court's rejection of the taxpayers' alternative contention that their petition was timely filed under the circumstances of this case, so as to confer jurisdiction on the Tax Court as to the taxable year 1961.

As to the taxable year 1960, however, the instant case should have been decided in accord with *W. S. Trefry,* 10 B. T. A. 134 (1928) and *Welch* v. *Schweitzer,* 106 F. 2d 885 (C. C. A. 9th Cir. 1939), which require a holding that the Commissioner's determination of a deficiency for 1960 is barred by the period of limitations.

In *W. S. Trefry, supra,* the taxpayer had moved from Topeka to Los Angeles and notified the collector at Wichita, Kansas, of his change of address. Notwithstanding, the deficiency notice was mailed on February 14, 1925, to the taxpayer at Topeka, Kansas, returned, unclaimed to the respondent, and then, on March 21, 1925, forwarded by the collector at Wichita to the taxpayer at his Los

Angeles address. A petition was filed on April 14, 1925, the last day for filing a petition under §274(a) of the Revenue Act of 1924. However, the applicable period of limitations had expired on March 5, 1925, "unless the letter of February 14, 1925 was 'mailed' to the petitioner, within the meaning of the Revenue Act of 1924 * * *." Denying jurisdiction, the Board stated:

> "It is clear that the notice of deficiency was not mailed to the petitioner on February 14, 1925, within the meaning of the statute. One of the elements of a proper mailing is missing—the notice was not properly addressed."

In *Welch* v. *Schweitzer, supra,* a notice of deficiency was mailed to the taxpayer at the address used on the returns for the taxable years involved. However, the taxpayer had moved and his new address was known to the examining Internal Revenue Agent. The notice of deficiency was originally mailed December 17, 1926. It was returned to respondent undelivered, readdressed correctly, remailed on January 8, 1927, and received by the taxpayer on January 13, 1927. Precisely as in this case, by the time the taxpayer received the notice of deficiency, the statute of limitations (which had been extended by waivers to December 31, 1926) had expired. Thus, even though the deficiency notice was actually received by the taxpayer with over one month still remaining within which to file a petition in the Tax Court, the Ninth Circuit held that a misaddressed notice not actually received until after the period of limitations has expired cannot confer jurisdiction upon the Tax Court.

The conflicting views of the intermediate appellate courts on these important jurisdictional questions should now be resolved by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN D. COHEN,
Attorney for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15952

JOSEPH DELMAN AND JEANETTE DELMAN,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Argued November 29, 1966

Before SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 10, 1967)

By SMITH, *Circuit Judge.*

This matter is before us on a petition to review an order of the Tax Court which dismissed as untimely taxpayers' petition for redetermination of 1960 and 1961 income taxes. The material facts as found by the Tax Court are not disputed. A notice of tax deficiencies for the years 1960 and 1961 was sent by certified mail to the taxpayers on December 23, 1964, addressed as follows:

Mr. Joseph Delman and
Mrs. Jeanette Delman
Husband and Wife
c/o Goodman, Israelow & Lipton
249 Clinton Avenue
Newark, New Jersey

A copy of this notice was sent by ordinary mail on the same day to taxpayers' attorney, Martin D. Cohen.

Both Cohen and the accounting firm of Goodman, Israelow, & Lipton received the notice on December 24,

1964. Goodman et als mailed the original to Cohen on that same date and he received it on December 28, 1964. On the latter date Cohen notified the taxpayer, Joseph Delman, of the notice by telephone. Cohen forwarded a copy of the notice of deficiency to the taxpayers during the week of December 28, and it was received by them on January 4, 1965.

Taxpayers' petition to the Tax Court was filed on April 5, 1965, 103 days after the notice of deficiency was mailed. Section 6213 of the Internal Revenue Code [1] provides that a petition for redetermination may be filed within 90 days of the mailing of the notice. On its face taxpayers' petition was out of time.

It is the taxpayers' primary argument that the notice of deficiency was invalid because it was not mailed to their last known address and that mailing to the last known address is essential to the jurisdiction of the Tax Court. If this argument is correct the notice would have no effect and would not have barred the running of the statute of limitations for the years in question.[2]

Taxpayers alternatively argue that because the notice of deficiency was sent to an incorrect address its effective date, in fairness, must be deemed to be January 4, 1965, the date the taxpayers actually received a copy of the notice of deficiency. The consequence of this argument, if accepted, would be that collection of deficiencies in the 1960 taxes would be barred by the statute of limitations and the petition for redetermination, as it relates to 1961 taxes, would be timely.[3]

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1 Unless otherwise noted all references are to the Internal Revenue Code of 1954, 28 U.S.C.A.

2 Section 6501 of the Code provides that taxes shall be assessed within three years of the date a return is filed. Returns filed in advance of the due date are deemed to have been filed on the due date. Taxpayers signed a waiver extending the statute of limitations for 1960 taxes until December 31, 1964. The statute of limitations on 1961 taxes would have run on April 15, 1965. A valid notice of deficiency tolls the running of the statute.

3 Ninety days from January 4, 1965 is Sunday, April 4. Assuming the date of filing to be the critical date (which was April 5) taxpayers' petition was timely because under section 6213(a) Sunday is not counted as a last day. Of course this whole argument is based on the assumption that January 4, 1965 is a correct starting point.

The undisputed primary facts, found by the Tax Court and relied upon by the taxpayers in support of their arguments are as follows. During April, 1961, when taxpayers filed their 1960 return, they resided at 67 Clinton Avenue, Millburn, New Jersey. That address was set forth on their 1960 tax return which was filed in Newark. In the latter part of 1961 taxpayers moved to 1604 Juniper Avenue, Elkins Park, Pennsylvania where they have resided since. Their 1961 tax return, also filed in Newark, listed in a space labeled home address, c/o Goodman, Israelow, & Lipton, 249 Clinton Avenue, Newark, New Jersey. Six other pages of this return also listed that address. Schedule SE of the same return (U.S. Report of Self-Employment Income) listed the Elkins Park address.

In late 1962 or early 1963 revenue agent Nicholas Russo was assigned to audit petitioners' 1961 return. He wrote to taxpayers in care of Goodman et als and was informed that Goodman represented the taxpayers. Russo and Goodman in fact held a conference. On two occasions in 1963 the Newark office of Internal Revenue mailed forms to taxpayers requesting information as to where taxpayers' 1961 tax return was filed and what the taxpayers' address was if different from 67 Clinton Avenue, Millburn. These forms were mailed to 67 Clinton Avenue, Millburn. Joseph Delman responded to the second of these requests and indicated that taxpayers' address was now 1604 Juniper Avenue, Elkins Park, Pennsylvania. In the latter part of 1963 Goodman orally notified Russo of the Elkins Park address.

On two occasions during 1964 Russo prepared a form 872 (extension of the statute of limitations). On both he listed taxpayers' present street address as 1604 Juniper Avenue, Elkins Park, Pennsylvania. On the first occasion the form was sent to Goodman. It was signed by the taxpayers and returned. On the second occasion the form was sent to Cohen. It was signed by the taxpayers but for some unexplained reason was never returned.

On June 2, 1964, a power of attorney was executed by taxpayers in favor of Martin D. Cohen and Edward Goodman and was filed with the Internal Revenue Service. It gave Cohen and Goodman the authority to represent the taxpayers before the Treasury Department in connection with any matter involving federal income taxes with which the petitioners were connected. It requested that a copy of all communications addressed to the taxpayers be sent to Martin Cohen. On November 12, 1964, Russo forwarded an information report to the District Director of Internal Revenue at Philadelphia. It indicated that taxpayers resided at 1604 Juniper Avenue, Elkins Park, Pennsylvania.

The Tax Court found that the Internal Revenue Service acted reasonably in sending the notice c/o Goodman, et als. Our examination of the record indicates that the Tax Court was clearly correct in this conclusion. The taxpayers were successfully reached at this address; they had been reached there before. The Service could reasonably believe that this was the method of communication taxpayers wished it to use. Under these circumstances may the method of service be held inadequate or invalid? We think not.

A resolution of the questions presented by the taxpayers requires at the outset a consideration of two statutory provisions. Section 6212(a) of the Code authorizes the Secretary or his delegate to send a notice of deficiency to the taxpayer by certified or registered mail. Section 6212(b)(1) provides in part:

> In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency . . ., if mailed to the taxpayer at his last known address shall be sufficient . . . even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

Addressing ourselves to the taxpayers' primary argument, the decision of the Tax Court may be upheld on any

of three alternative grounds. (1) The notice of deficiency was in fact sent to taxpayers' last known address within the meaning of the statute. (2) Section 6212(b)(1) is inapplicable to the instant case. (3) Even if the notice were not mailed to taxpayers' last known address and this were required by the statute the instant mailing was not so deficient as to bar the Tax Court's jurisdiction.

Numerous cases have considered the question of whether a notice of deficiency was sent to taxpayer's "last known address." Few cases, however, have attempted to define what Congress meant by the term. Clark's Estate v. Commissioner of Internal Revenue, 173 F.2d 13 (2nd Cir. 1949) suggests that a notice complies with the statute if it is sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached. Gregory v. United States, 57 F. Supp. 962, 973 (Ct. Cl. 1944), *cert. denied*, 326 U.S. 747 states that the term "had reference to the last known permanent address or legal residence of the taxpayer, or the last known temporary address of a definite duration or period to which all communications during such period should be sent." Kisting v. C.I.R., 298 F.2d 264 (8th Cir. 1962) suggests that the last known address may be that of taxpayers' attorney where taxpayer directed that communications be sent. D'Andrea v. C.I.R., 263 F.2d 904 (D.C. Cir. 1959) makes that point explicitly. Eppler v. Commissioner of Internal Revenue, 188 F.2d 95 (7th Cir. 1951) suggests that under certain circumstances the last known address may be the taxpayer's business address. Petitioner urges that the last known residence address must be chosen.

In our view the spirit of the Act would dictate acceptance of the attitude expressed in Clark's Estate, *supra*. The purpose of the notice of deficiency is to give the taxpayer notice. Commissioner of Internal Revenue v. Stewart, 186 F.2d 239 (6th Cir. 1951); Boren v. Riddell, 241 F.2d 670, 672 (9th Cir. 1957); Commissioner of Internal Revenue v. New York Trust, 54 F.2d 463, 465 (2nd

Cir. 1931). By using the phrase "last known address" Congress must have intended that notice be sent to that address where the Secretary (or his delegate) reasonably believed the taxpayer wished notice to be sent. Here the Secretary had two addresses for the taxpayer, both of which were equally suitable. The service had been dealing through the accounting firm even after receipt of the Pennsylvania address. It could reasonably have concluded that the taxpayer wished the communication sent there. This view is strengthened by the fact that the accountant was one of taxpayers' authorized attorneys.

Perhaps the most serious difficulty with this case is the attempt to apply a section of the code which is not applicable. Section 6212(b)(1) was intended to apply only in situations where the Secretary did not have the taxpayer's correct address because of the failure or inability of the taxpayer to notify him of a change. This section was enacted to protect the Secretary in this circumstance and is not a sword to be used by the taxpayer. The language "shall be sufficient" is the first key to this analysis. It immediately suggests that although other means may be equally suitable and, perhaps, even better, the Government is protected if the notice is sent to the last known address. The legislative history of section 6212(b)(1) bears this out.

The remotest predecessor of section 6212(b)(1) was section 281(d) of the Revenue Act of 1926. The language is very close to that found in the current code. Its legislative history suggests that it was enacted to protect the Commissioner who mailed a notice to the taxpayer when, for some reason, a fiduciary had been substituted for the taxpayer without the Commissioner's knowledge. S. Rep. No. 52, 69th Cong., 1st Sess. (1926), 1939-1 Cum. Bull. (part 2) 332, 355; H.R. Rep. No. 356, 69th Cong., 1st Sess. (1926), 1939 Cum. Bull. (part 2) 361, 372-3; Olsen v. Helvering, 88 F.2d 650, 651 (2nd Cir. 1937).

A similar provision was enacted as section 272(k) of the Revenue Act of 1928. The legislative history of this

provision indicates that its presence was dictated because of the tendency of taxpayers to change their address without notifying the Commisioner. H.R. Rep. No. 2, 70th Cong. 1st Sess., (1927), 1939-1 Cum. Bull. (part 2) 384, 399; S. Rep. No. 960, 70th Cong., 1st Sess., 1939-1 Cum. Bull. (part 2) 409, 430. Reading together the reports of the 1926 and 1928 Acts it appears that the intention of Congress with respect to the 1928 Act was to expand the 1926 provision to taxpayers generally. See Gregory v. United States, *supra*. Similar language has been contained in revisions since 1928 and is now found in section 6212(b)(1) of the 1954 Internal Revenue Code.

Considering the language of section 6212(b)(1) and its history as just related we think that it is clear that Congress neither in words nor in purpose sought to create a mandatory address to which notices of deficiency must be sent. Rather it attempted to preserve the legislative scheme of notices of deficiency and tax court review. It prevented the taxpayer from frustrating this scheme through failing to notify Internal Revenue of a change in status or address. The Commissioner was entitled to rely on the address in his file even though the taxpayer or his representative could no longer be reached at that address. Thus it is sufficient to send the notice to the taxpayer at his last known address, even though it does not reach him there because of his failure to give notice of a change.

With this analysis in mind it is clear that section 6212(b)(1) does not apply to the instant case. This is not an instance where the service failed to notify the taxpayer because of an unreported change in address or because of a failure by the Service to heed a change in address with the result that the taxpayer was not notified. This forces us back to section 6212(a) which requires that a notice be sent to the taxpayer by registered mail. This was done in the instant case.

Accepting, arguendo, that section 6212(b)(1) requires notices of deficiency to be sent to taxpayer's last known

address and that the notice in the instant case was not, it does not automatically follow, as contended by the taxpayer, that this would operate as a bar to the Tax Court's exercise of jurisdiction.

Courts considering this problem have not been unanimous in their method of treatment. Several courts appear to have proceeded on the assumption that notice to be valid must be sent to the last known address, although the question is not specifically discussed. Maxfield v. Commissioner of Internal Revenue, 153 F.2d 325 (9th Cir. 1946); Luhring v. Glotzbach, 304 F.2d 556 (4th Cir. 1962). One court has impliedly indicated that even if the taxpayer has received actual notice in a timely fashion the notice will be deemed invalid if not sent to the last known address. D'Andrea v. C.I.R., 263 F.2d 904 (D.C. Cir. 1959). Other courts have concluded that strict compliance with the statute is not required, and that the focus should be on whether the taxpayer had timely actual notice. Commissioner of Internal Revenue v. Stewart, 186 F.2d 239, (6th Cir. 1951). A particularly good discussion is to be found in Olsen v. Helvering, 88 F.2d 650 (2nd Cir. 1937). One case has held that timely receipt of actual notice cures any defect in mailing. Goolsby v. Tomlinson, 246 F. Supp. 675 (S.D. Florida 1965); Cf. Dolezilek v. Commissioner of Internal Revenue, 212 F.2d 458 (D.C. Cir. 1954).

It seems to us that those courts which have adopted the view that mailing of a technically perfect notice of deficiency is not a prerequisite to the jurisdiction of the Tax Court have the sounder approach. It appears that the other courts, as well as the petitioners, herein, have equated the notice of deficiency with the summons and complaint in a civil action. Service of a summons and complaint serves two functions: it provides notice of the institution and nature of an action, and it gives the court jurisdiction over the person of the party served. Technically perfect service is a prerequisite to the court's personal jurisdiction over the party served, although imperfect service may serve the notice function.

A notice of deficiency is very different. Its purpose is to notify the taxpayer that a deficiency has been determined against him. Commissioner of Internal Revenue v. Stewart, *supra*; Boren v. Riddell, *supra*; Commissioner of Internal Revenue v. New York Trust Co., *supra*. The mailing of a notice, unlike the filing of a complaint, does not commence an action in any court. It does not subject the taxpayer to the jurisdiction of the Tax Court. It merely allows the taxpayer, if he so desires, to commence an action in the Tax Court within the statutory period. It is his "ticket". There is no compulsion to use it. The common function of the summons and complaint and notice of deficiency is providing notice. The notice of deficiency does not, however, give the Tax Court jurisdiction over the person of the taxpayer.

It is true that unless a notice of deficiency is mailed to the taxpayer the Tax Court may not acquire jurisdiction over the cause. Dudley v. Commissioner of Internal Revenue, 258 F.2d 182, 183 (3rd Cir. 1958). This, however, is because the time for filing a petition to the Tax Court depends on when the notice of deficiency was mailed. Section 6213 of the Code. If a notice of deficiency were mailed to an incorrect address and not received by the taxpayer there would naturally be strong reason for determining that no notice was mailed. Where, however, the notice is mailed to a correct, albeit not the last known address, and is received in a timely fashion by the taxpayer or his authorized agent, no statutory scheme or purpose would thereby be violated. The purpose of the notice has been served when it is actually received. The taxpayer has his ticket to the Tax Court and ample opportunity to file a petition for review. In the instant case where no prejudice to the taxpayers is alleged, and where no such finding could be sustained, no statutory purpose or intent would be served by determining that the notice was invalid.

Petitioners' alternative argument must also be rejected. Taxpayers' accountant, and the attorney who ultimately

filed the petition to redetermine the deficiency both had knowledge of the deficiency the day after notice was mailed. Taxpayers were promptly notified by their attorney of the notice. There is no argument, nor could there be, that the taxpayers were prejudiced in any way because of the manner in which the notice of deficiency was addressed. Because of this lack of prejudice none of the cases relied upon by the taxpayers in their brief are brought into play. Thus the date of mailing by the Internal Revenue Service commenced the running of the time for filing the petition for redetermination. Taxpayers' petition was out of time and the Tax Court correctly dismissed the petition for this reason.

Although we have rejected all taxpayers' arguments let it not be said that we have thereby deprived them of an opportunity to challenge the validity of this deficiency assessment on the merits. If the taxpayers' feel they have a meritorious claim they may, after paying the tax, still have the option of filing a suit for refund in the United States District Court.

Judge Seitz agrees with the conclusion except that he expresses no opinion with respect to the issue as to whether the mailing of a technically perfect notice of deficiency is a prerequisite to the jurisdiction of the Tax Court.

The decision of the Tax Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15, 952

JOSEPH DELMAN and JEANETTE DELMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(T. C. Docket No. 1844-65)

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present:

SMITH, FREEDMAN and SEITZ,
Circuit Judges

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

ATTEST:
THOMAS F. QUINN
Clerk

October 10, 1967

APPENDIX C

Memorandum Findings of Fact and Opinion of Tax Court of the United States

T. C. Memo. 1966-59
TAX COURT OF THE UNITED STATES

JOSEPH DELMAN and JEANETTE DELMAN,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 1844-65 Filed March 22, 1966.

Respondent mailed a notice of deficiency to the petitioners in care of their accountant, the address petitioners used on their 1961 return. *Held*: The purpose of sec. 6212, I.R.C. 1954, is to establish a procedure which results in a high probability that taxpayers will receive notice of any deficiency. Under all the facts and circumstances, respondent acted reasonably, and petitioners had an adequate opportunity to file a timely petition.

Martin D. Cohen, for the petitioners.

Leo A. Burgoyne, for the respondent.

Appendix C

SIMPSON, *Judge*: In this proceeding, the petitioners and the respondent have both filed motions to dismiss for lack of jurisdiction. The petitioners contend that the notice of deficiency was not valid because it was not mailed to them in accordance with section 6212 of the Internal Revenue Code of 1954;[1] and the respondent seeks dismissal on the ground that the petition was not filed timely.

FINDINGS OF FACT

Some of the facts were stipulated and those facts are so found.

Petitioners, Joseph and Jeanette Delman, are husband and wife. They filed their joint income tax returns with the district director of internal revenue at Newark, New Jersey, for the taxable years 1960 and 1961.

During April 1961, the petitioners resided at 67 Clinton Avenue, Millburn, New Jersey. During that month, they filed a return for the calendar year 1960 in which they set forth such address as their home address.

In the latter part of 1961, the petitioners moved. In January 1962, they resided at 1604 Juniper Avenue, Elkins Park, Pennsylvania, and continued to reside at such address until the time of this proceeding. On the face of their income tax return for 1961, filed in April 1962, the petitioners entered the following in the space labeled "home address":

---

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise noted.

Appendix C

c/o Goodman, Israelow & Lipton
249 Clinton Ave.
Newark, N. J.

Such address was also written on six other pages of their 1961 income tax return. However, on Schedule SE (U. S. Report of Self-Employment Income) of the same return, the petitioners wrote in 1604 Juniper Ave., Elkins Park 17, Pa., as their home address.

In late 1962 or early 1963, revenue agent Nicholas Russo was assigned to examine petitioners' 1961 return. In the course of this examination, the taxable year 1960 was reopened. At the outset of this audit, Russo sent a letter to petitioners, which he addressed to Goodman, Israelow & Lipton, 249 Clinton Avenue North, Newark, New Jersey. This letter was acknowledged by telephone by Goodman, who informed Russo that he represented the taxpayers and agreed to an examination on the date suggested by Russo.

A conference was held between Russo and Goodman at which time the latter did not indicate that Russo's letter had been misaddressed. The date of this conference is not established.

On two occasions in 1963, the Newark, New Jersey, office of the Internal Revenue Service mailed a Form L-20 to the petitioner. On April 2, 1963, the second such form was mailed to petitioner Joseph at 67 Clinton Ave., Millburn, N. J. This form informed the taxpayer that the district director at Newark had no record of taxpayer's return for 1961. It requested information on where such return was filed and the taxpayer's address, if different from 67 Clinton Avenue, Millburn. This letter was addressed to petitioner Joseph only. The petitioner re-

sponded that he had filed a return for 1961 in Newark, New Jersey. He further replied that his address was different than 67 Clinton Avenue and that it was 1604 Juniper Ave., Elkins Park, Pa. This letter was mailed to the district director in a self-addressed envelope supplied by the Revenue Service.

In their 1962 and 1963 income tax returns, petitioners gave their address as 1604 Juniper Avenue. The record does not disclose with which district director's office these returns were filed.

In the latter part of 1963, Russo was orally advised by Goodman that the taxpayers' residence was 1604 Juniper Avenue, Elkins Park, Pennsylvania. The agent dealt with and met Goodman as representative of the taxpayers even before a power of attorney was on file with the Service. Russo noted the Elkins Park address in his report to the taxpayer inviting him to appear before the district director.

In the early part of February 1964, Russo had a Form 872 prepared. The execution of this form waived the statute of limitations for the taxable year 1960 and permitted assessment for that year at any time or on before December 31, 1964. In the blank labeled "Street address," Russo made the following entry:

> Formerly: 67 Clinton Avenue, Millburn, New Jersey
>
> Presently: 1604 Juniper Avenue, Elkins Park, Pennsylvania

This form was sent to the petitioners in care of Goodman, Israelow & Lipton. Russo testified that the Elkins Park address used by him was obtained from conversations with Goodman. The form was signed by the petitioners and re-

turned to the Internal Revenue Service, where it was affixed to the 1960 return and has continually remained so affixed throughout the period of time here material.

On June 2, 1964, a power of attorney was executed in favor of Martin D. Cohen, counsel for the petitioners in this case, and Edward Goodman. That power of attorney provides in part as follows:

POWER OF ATTORNEY

> Known All Men by These Presents, that We, Joseph Delman and Jeanette Delman do by these presents hereby make, constitute and appoint Martin D. Cohen, 744 Broad Street, Newark, New Jersey, and Edward Goodman, 294 [sic] Clinton Avenue, Newark, New Jersey their agents and attorneys, our true and lawful attorneys to appear for and represent us before the Treasury Department in connection with any matter involving and federal taxes in which we are a party, and more particularly income taxes for the taxable years 1960 to 1963, inclusive, giving the said attorney full power to do everything necessary to be done in the premises with full power of substitution or revocation, at any time subsequent to the date hereof, and prior to the revocation hereof, including, without limiting the generality of the foregoing, the power to request, receive and inspect all documents; to receive refund checks; to file returns; and to execute closing agreements, protests, consents extending any period of limitations, and any waiver of restrictions on assessment or collection of any tax, as fully and to all intents and purposes as we might do.

Appendix C

It is requested that a copy of all communications addressed to the undersigned regarding any matter in which said attorney hereby authorized to act, be addressed to Martin D. Cohen, Room 1602, 744 Broad Street, Newark 2, New Jersey.

All powers of attorney for this purpose heretofore filed or executed by the undersigned are hereby revoked.

In June of 1964, Cohen appeared on behalf of the petitioners at an informal conference with Russo. At no time did Cohen advise Russo that any communications to the petitioners should be addressed to 1604 Juniper Avenue, Elkins Park.

In October 1964, Russo had a new Form 872 prepared and sent to Cohen. If executed by the petitioners and accepted by the respondent, this form would have waived the statute of limitations with respect to the taxable year 1960, and permitted an assessment on or before December 31, 1965. Russo's primary reason for sending the form to Cohen was because Cohen had submitted the power of attorney and had appeared on behalf of the petitioners at the conference. In the space labeled "Street address," Russo entered the following:

Formerly:

67 Clinton Avenue, Millburn, N. J.

Presently:

1604 Juniper Ave., Elkins Park, Pa.

In placing this address on the form, Russo referred to the 1960 and 1961 returns, the information that Goodman had given him, and a notation Russo had made in his administrative file. The notation was made after receipt of the

power of attorney. The petitioners signed this form on October 27, 1964, but it was never submitted to the Internal Revenue Service.

On November 12, 1964, agent Russo forwarded an information report to the district director of internal revenue at Philadelphia. Russo's purpose in sending this report was to convey certain information to the district director. This report stated the following under the caption "Name and Address (As it appears on return)":

> Joseph & Jeanette Delman
> 1604 Juniper Ave.
> Elkins Park, Penn.

Under the caption "Remarks and Information Obtained," the report stated, "taxpayer presently residing in your district." Under the caption "Source of Information" there is a blank labeled "Name and Address of Source." In that blank, the following was entered:

> Joseph & Jeanette Delman
> c/o Goodman, Israelow & Lipton
> 249 Clinton Ave.
> Newark, N. J.

A notice of deficiency dated December 23, 1964, relating to the petitioners' taxable years 1960 and 1961, was sent by certified mail on December 23, 1964, addressed as follows:

> Mr. Joseph Delman and
> Mrs. Jeanette Delman
> Husband and Wife
>
> c/o Goodman, Israelow & Lipton
> 249 Clinton Avenue
> Newark, New Jersey

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A copy of the deficiency notice was also sent by ordinary mail on December 23, 1964, to Cohen. This copy of the notice and the respondent's covering letter were received by Cohen on December 24, 1964.

The notice of deficiency was received by the accounting firm of Goodman, Israelow & Lipton on December 24, 1964, and forwarded on the same day by Edward Goodman, a partner in the accounting firm, to Cohen. Cohen received the original notice of deficiency on Monday, December 28, 1964, from Goodman. Later that day, Cohen telephoned petitioner, Joseph Delman, at the latter's office in Philadelphia, Pennsylvania, and advised him of the facts.

Cohen forwarded a copy of the notice of deficiency to the petitioners some time during the week of December 28, 1964. The copy of the notice of deficiency was received by petitioners on January 4, 1965, but the petitioner Joseph did not see the original notice until the hearing in this proceeding.

On April 5, 1965, petitioners filed a petition with this Court.

OPINION

In disposing of these motions, the pertinent provisions of the Code are sections 6212 and 6213. Under section 6212(a), the respondent is authorized to send the taxpayer a notice of deficiency by registered or certified mail. Section 6212(b)(1) provides, that if the notice of deficiency is mailed to the taxpayer at his last known address, it is effective, irrespective of whether the taxpayer is deceased or incapacitated. Section 6213(a) provides, among other things, that within 90 days from the mailing of the notice authorized by section 6212, the taxpayer may file a petition with this Court for redetermination of the deficiency.

If we grant either motion, there will be a dismissal on jurisdictional grounds. However, the consequences of granting respondent's motion are quite different than those of granting the petitioners' motion. See *Rosewood Hotel, Inc.* v. *Commissioner,* 275 F. 2d 786 (C. A. 9, 1960), reversing an unreported order of this Court; *D'Andrea* v. *Commissioner,* 263 F. 2d 904 (C. A. D. C., 1959), reversing an unreported order of this Court. Therefore, we shall consider the petitioners' motion first, and not consider dismissal for late filing unless a valid deficiency notice has been issued. This procedure has been adopted by the Tax Court in similar circumstances. *John W. Heaberlin,* 34 T. C. 58 (1960), acq. 1960-2 C. B. 5.

The petitioners contend that the deficiency notice is invalid because it was not sent to their last known address, and that the power of attorney filed with the Internal Revenue Service was neither an authorization, nor a request, that deficiency notices be sent to petitioners' accounting firm. They have also argued that section 6212 is mandatory unless waived, and requires the respondent to mail the deficiency notice by registerd or certified mail to the petitioners' last known address.

The respondent has countered that the notice of deficiency was properly addressed and therefore valid. In addition, the rspondent urges that the notice is valid even if not sent to petitioners' last known address, because it was received by the petitioners in ample time to assert their case before the Tax Court.

The procedural provisions of section 6212 and 6213 have existed for many years in substantially their present form. The courts have been confronted with many questions concerning their interpretation and application—such as,

whether a valid notice of deficiency can be transmitted only by registerd or certified mail, and whether such mailing has been to the taxpayer at an address last known to the Commissioner. In the course of answering their questions, the courts have examined the procedural provisions of the Code and concluded that their purpose is to establish a procedure which results in a high probability that the taxpayer will receive notice of any deficiency determined against him. *Clement Brazezinski,* 23 T. C. 192 (1954). The courts have attempted to carry out the purpose of those provisions by examining all the facts and circumstances of each case. See *Langdon P. Marvin, Jr.,* 40 T. C. 982 (1963); *Burt D. Parker,* 12 T. C. 1079 (1949). We must, therefore, examine all the facts and decide whether the respondent acted reasonably in attempting to notify the taxpayer of the deficiency, and whether the taxpayer had a reasonable opportunity to file a timely petition with this Court. *Dolezilek* v. *Commissioner,* 212 F. 2d 458 (C. A. D. C., 1954), affirming an unreported order of this Court; *Daniel Thew Wright,* 34 B. T. A. 84 (1936), affd. 101 F. 2d 309 (C. A. 4, 1939).

After examining the facts of this case, we conclude that the respondent acted reasonably when he mailed the deficiency notice by certified mail to the petitioners in care of their accountant, and a copy to their attorney by regular mail. The accountant's firm name and address was stated as the petitioners' home address on the face of the 1961 return and on six other pages of the return. The same return also reported the petitioners' Elkins Park address as their home on Schedule SE (U. S. Report of Self-Employment Income). Thus, the respondent's employees could reasonably infer that the petitioners intended them to send any communication concerning taxable year 1961 to their accountant, and that the petitioners were residing at the

Elkins Park address. If the respondent had sent a notice of deficiency to the petitioners in care of their accountant after the filing of their 1961 return, but before the occurrence of any other events, it would be clear that the notice was sent to them at their last known address.

What happened subsequently surely did not constitute a change in the facts that could reasonably be inferred from the 1961 return. At the outset of audit, Russo, the revenue agent, sent a letter to the petitioners in care of their accountant, Goodman. The respondent received a telephone reply from Goodman stating that he was authorized to act for the taxpayers and that he agreed to an informal conference. Goodman dealt with the respondent at that conference thereby confirming what was indicated by the petitioners' 1961 tax return—namely, that any inquiry or notice concerning such return should be sent to Goodman. At no time did Goodman indicate that notices to the petitioners should be sent to Elkins Park. What Goodman did tell respondent was that the taxpayers resided at Elkins Park, a fact already known to the respondent.

In April 1963, the respondent directed a letter to the petitioners' old residence, 67 Clinton Avenue, Millburn, New Jersey. This form letter requested information with respect to taxable year 1961 and inquired whether Joseph's address differed from 67 Clinton Avenue, Millburn, New Jersey. The petitioner responded to the district director at Newark by filing in his Elkins Park address on the form requesting such information. Since the Elkins Park address was already on file in the district director's office at Newark, the petitioners response to this letter really added nothing new. Accordingly, no instruction concerning deficiency notices for 1960 or 1961 can be found in this correspondence.

Appendix C

In February 1964, the respondent sent a Form 872 to the petitioners in care of Goodman. The respondent had typed on this form that the petitioners' former address was in Millburn, and that their present address was in Elkins Park. Again, the respondent received a reply to mail thus addressed, this time signed by the taxpayers themselves. It is clear that in the early part of 1964, the year the deficinecy notice was mailed, correspondence to the taxpayers could be, and should be, sent in care of their accountant. The use of that address was not only called for by the 1961 return, but was a proven, effective means of actually reaching the petitioners.

When attorney Cohen entered the case, Goodman was not thereby discharged as representative of the taxpayers. In fact, the power of attorney which evidenced Cohen's authority to act, also named Goodman as the petitioners' co-representative. Petitioners and respondent have argued at length concerning the meaning of this power of attorney. We do not decide whether this power would be sufficient standing alone, to justify sending the notice to Goodman. But we do consider it as one element in the case which tends to show Goodman's authority to act, and the reasonableness of respondent's conduct. This power of attorney certainly reinforced the petitioners' instruction on their 1961 return that Goodman's address was, for purposes of that tax year, their home address. Cohen never informed the respondent that any notices to the petitioners should be sent to their residence in Elkins Park.

The only indication respondent received which may have cast doubt on Goodman's role was that Cohen attended a conference concerning petitioners' taxes in June 1964, and Goodman did not. As a result of the attendance of Cohen at that conference, and a subsequent telphone conversation

between Cohen and Russo, a new Form 872 was sent to the petitioners in care of Cohen. It may be argued that these facts warrant the inference that Cohen had replaced Goodman. However, we do not consider such an inference warranted by the facts, nor do we understand the petitioners to argue that the notice should have been mailed to Cohen.

In summary, we find nothing in the events between the filing of the 1961 return and the mailing of the notice of deficiency which could have, or should have, caused the respondent to doubt that the petitioners' home address, for purposes of such return, was in care of their accountant.

The events occurring after the notice of deficiency was mailed clearly demonstrate that the petitioners received notice sufficient to enable them to file a timely petition. The day after the deficiency notice was mailed, the petitioners' accounant received the original and their attorney received a copy. Goodman forwarded the original notice to Cohen, and Cohen discussed it with Joseph, only five days after it had been mailed. The fact that the original notice was not seen by the petitioners until the hearing on this motion was because Cohen retained it. The taxpayers' counsel mailed a copy of the notice to the petitioners during the week of December 28, 1964. We don't know why Cohen retained the copy subsequent to December 24, or exactly when he mailed it, or why the petitioners didn't receive it before the statute of limitations had expired. However, it is clear that before the statute had run, the petitioners' authorized agents possessed the notice of deficiency, or a copy of it, and that petitioners were well aware of its content. Whatever decisions and preparations for trial the petitioners and their counsel had to make, it is clear that the time in which to make them was adequate. It would be

a triumph of rhetoric over reason to find that under these facts, the notice of deficiency was inadequate and not sent to the taxpayers as authorized by section 6212(a).

In conclusion, we hold that the notice of deficiency is valid because we are convinced from an examination of all the circumstances of the case that the respondent acted reasonably in sending the notice to the petitioners in care of their accountant and that the petitioners did in fact receive adequate notice to file a timely petition with this Court.

Since the notice of deficiency was mailed pursuant to section 6212 on December 23, 1964, the 90-day period within which a petition could be filed with this Court began the following day. Accordingly, the petition was filed late, and for that reason this Court lacks jurisdiction to do anything more than to dismiss it.

Therefore,

Petitioners' motion to dismiss will be denied, and respondent's motion to dismiss will be granted.

APPENDIX D

Order of Dismissal of the Tax Court

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed March 22, 1966, it is

ORDERED: That respondent's motion to dismiss for lack of jurisdiction filed May 21, 1965, is granted, and it is

FURTHER ORDERED: That petitioners' cross-motion to dismiss for lack of jurisdiction filed June 14, 1965, is denied.

(Signed) CHARLES R. SIMPSON
Judge

Entered: Mar. 22, 1966

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 999

JOSEPH DELMAN AND JEANETTE DELMAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners filed a petition for redetermination of income tax deficiencies for the years 1960 and 1961 in the Tax Court 103 days after respondent mailed a deficiency notice (Pet. 6). The Tax Court granted respondent's motion to dismiss on the jurisdictional ground that the petition was filed after the 90-day period allowed by Section 6213 of the Internal Revenue Code of 1954 (Pet. 13a, 25a–26a). At issue here is the Tax Court's denial of petitioners' cross-motion, which had also sought dismissal of the petition for lack of jurisdiction, but on the alternative ground that the deficiency notice was allegedly mailed to an address other than the one which petitioners claim was

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their "last known address" within the meaning of Section 6212 of the Code, and was therefore invalid (Pet. 13a, 19a, 25a–26a).

The deficiency notice was sent by certified mail on December 23, 1964, and was addressed to petitioners in care of their accountant, Edward Goodman. A copy was sent by ordinary mail, on the same day, to petitioners' attorney, Martin D. Cohen. Both the accountant and the attorney received the respective notices on December 24, 1964. Goodman mailed the original to Cohen on the same date that he received it, and Cohen, in turn, received the original on December 28, 1964. On the latter date Cohen notified petitioner Joseph Delman of the deficiency notice by telephone. Cohen forwarded a copy of the deficiency notice to petitioners during the week of December 28, 1964, and they received it on January 4, 1965. On April 5, 1965, petitioners filed their petition with the Tax Court (Pet. 1a–4a, 18a–19a).

Both courts below found as a fact that under the circumstances the deficiency notice had been mailed to petitioners' last known address (Pet. 5a, 25a). Those findings are not clearly erroneous and should not be the subject of further appellate review.

The facts demonstrate that petitioners had two addresses, both of which were known to the Commissioner at the time the deficiency notice was mailed. One of these addresses was in care of Goodman, their accountant, in Newark, New Jersey, which the 1961 income tax return listed as their "home address" (Pet. 13a–14a). The other was petitioners' residence in Elkins Park, Pennsylvania, to which they had

moved late in 1961. On June 2, 1964, they gave respondent a power of attorney which gave Messrs. Cohen and Goodman power of attorney in connection with any federal tax matter, with full authority "to * * * receive * * * all documents * * *" and, further, requested the Treasury Department to send to Cohen a copy of all communications relating to petitioners' federal tax matters (Pet. 16a). This record contains ample support for the finding below that respondent acted reasonably in mailing the deficiency notice to petitioners in care of their accountant's address with a copy to their attorney, since, as the courts below reasoned, the course of dealings between respondent, petitioners, and their representatives indicated petitioners' preference that communications concerning their taxes be mailed in such manner rather than to petitioners' residence in Elkins Park (Pet. 4a–5a, 24a).[1]

[1] The practical problems confronting both the Commissioner and taxpayers in notice cases are exemplified in *D'Andrea* v. *Commissioner*, 263 F. 2d 904 (C.A. D.C.), one of the cases petitioners contend to be in conflict with the decision here (Pet. 8–9). Had the Commissioner notified petitioners in the manner they here assert to be proper, they might now be seeking a determination that the notice was invalid because it was not mailed by registered mail to the accountant, since *D'Andrea* held fatal the failure of the Commissioner to honor a direction in a power of attorney to send any deficiency notice to the taxpayer's attorney.

The Court of Appeals stated that it would have sustained the decision of the Tax Court on any of three alternative grounds. The two other than the factual determination that the notice of deficiency was sent to petitioners' "last known address" were: (1) Section 6212(b)(1) is inapplicable to the instant case; and (2) even if the notice were not mailed to petitioners' last known address and this were required by Section 6212(b)(1), the instant mailing was not so deficient as

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to bar the Tax Court's jurisdiction (Pet. 5a). Had the result below rested solely on these two postulates, petitioners' assertion (Pet. 8–9) of a conflict with the holdings of other circuits might well have been meaningful. However, resolution of these alternative questions would not affect the outcome of petitioners' case, and is therefore not appropriate here.

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